Mohktar bin Jaya v Helen Las ak Renyo

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24NCvC-13–5 OF 2014(HC 1)
MAIRIN IDANG JC
19 DECEMBER 2014

Land Law — Restraint on dealings — Caveats — Private caveat — Removal of private caveat — Application by registered owner to remove private caveat — Whether defendant had an interest in the land which needed to be protected — Onus on caveator — Elements to be established by caveator — Test for removal of caveat

The defendant owned a piece of land ('the land') on which the defendant lived. The defendant came to know that the land had been transferred to one Na' bt Zainudin and then to one Hamidi bin Jamil and subsequently to one Mohktar bin Jaya without the defendant's knowledge or consent. The defendant discovered that her signature on the memorandum of transfer was purportedly witnessed by one Susan Gau an advocate from Messrs Lim Tan & Partners. The defendant also discovered that she had purportedly applied for the issuance of a new title to the said land which was issued by the Department of Lands and Surveys on the 20 August 2011. The defendant thus lodged a police report and on the instruction of the police, she registered a private caveat on the said land. The plaintiff filed the present application to remove the said caveat.

Held, dismissing the plaintiff's application with costs of RM3,000:

(1) The plaintiff as the registered owner of the land had a prima facie right to have the caveat removed unless the defendant could establish that she had an interest in the land which needed to be protected (see para 8).

(2) In an application by a registered owner or caveatee to remove a caveat, the onus is on the caveator to satisfy the court that on the evidence presented to it, the caveator's claim to an interest in the land raises a serious question to be tried and the caveator must then go on to show that on the balance of convenience it would be better to maintain the status quo until the determination of the trial by preventing the registered owner from disposing the land to a third party; *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 refered (see para 8).

(3) In 1995 the Court of Appeal introduced a three stage inquiry when hearing application for removal of caveat in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. The first stage is the examination of the grounds expressed in the application

for the caveat. The defendant is obliged to satisfy the court that his claim as expressed in the application in Form O amounts in law to a caveatable interest. The defendant had complied with the requirement of the first stage. The second stage of the inquiry involves the defendant showing that based on the affidavits filed, his claim discloses a serious question meriting a trial. The defendant had raised serious issues. The third stage relates to the balance of justice. The defendant had shown a caveatable interest and that there were serious issues to be tried. Thus the balance of convenience lay with the retention of private caveat to ensure that status quo was maintained pending the determination of the dispute between the parties (see paras 9, 12–14, 22 & 26).

[Bahasa Malaysia summary

Defendan memiliki sebidang tanah ('tanah tersebut') di mana defendan menetap. Defendan mendapat tahu bahawa tanah telah dipindahkan kepada seorang yang bernama Na' bt Zainudin dan selepas itu kepada seorang yang bernama Hamidi bin Jamil dan kemudiannya kepada seorang yang bernama Mohktar bin Jaya tanpa pengetahuan atau izin defendan. Defendan mendapati tandatangannya atas memorandum pindah disaksikan oleh seorang yang bernama Susan Gau peguam daripada Tetuan Lim Tan & Partners. Defendan juga mendapati bahawa dia dipercayai memohon untuk pengeluaran hak milik baru tanah tersebut yang mana dikeluarkan oleh Jabatan Tanah dan Ukur pada 20 Ogos 2011. Defendan oleh itu membuat laporan polis dan atas arahan polis, dia mendaftarkan kaveat persendirian ke atas tanah tersebut. Plaintif memfailkan permohonan ini untuk memotong kaveat tersebut.

Diputuskan, menolak permohonan plaintif dengan kos sebanyak RM3,000:

(1) Plaintif sebagai pemilik berdaftar tanah tersebut mempunyai hak prima facie untuk membuat kaveat tersebut dipotong kecuali defendan boleh membuktikan bahawa dia mempunyai kepentingan dalam tanah tersebut yang perlu untuk dilindungi (lihat perenggan 8).

(2) Dalam permohonan oleh pemilik berdaftar atau penanggung kaveat untuk memotong kaveat, beban adalah ke atas pengkaveat untuk memuaskan mahkamah bahawa atas keterangan yang dikemukakan kepadanya, tuntutan pengkaveat kepada kepentingan dalam tanah tersebut membangkitkan soalan serius untuk dibicarakan dan pengkaveat kemudiannya mesti menunjukkan bahawa atas imbangan kesenangan ia adalah lebih baik dikekalkan status quo sehingga penentuan perbicaraan dengan menghalang pemilik berdaftar daripada melepaskan tanah tersebut kepada pihak ketiga; *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 dirujuk (lihat perenggan 8).

(3) Pada tahun 1995 Mahkamah Rayuan memperkenalkan siasatan tiga peringkat apabila mendengar permohonan untuk pemotongan kaveat

dalam kes *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. Peringkat pertama adalah pemeriksaan terhadap alasan-alasan yang dikemukakan di dalam permohonan untuk kaveat. Defendan bertanggungjawab untuk memuaskan mahkamah bahawa tuntutannya seperti yang dikemukakan di dalam permohonan Borang O dari segi undang-undang berjumlah kepada kepentingan kaveat. Defendan telah memenuhi dengan kehendak peringkat pertama. Peringkat kedua siasatan melibatkan defendan menunjukkan bahawa berdasarkan afidavit-afidavit yang difailkan, tuntutannya mengemukakan soalan serius yang memeritkan perbicaraan. Defendan telah membangkitan isu yang serius. Peringkat ketiga berkaitan kepada imbangan keadilan. Defendan telah menunjukkan kepentingan kaveat dan bahawa terdapat isu serius untuk dibicarakan. Oleh itu imbangan kesenangan terletak ke atas pengekalan kaveat persendirian untuk memastikan bahawa status quo dikekalkan sementara menanti penentuan pertikaian di antara pihak-pihak (lihat perenggan 9, 12–14, 22 & 26).]]]

Notes

For cases on caveats, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4347–4750.

Cases referred to

Devi Meyyammai a/p M Ramanathan & Anor v Hartini bt Mohamad & Anor [2013] 3 MLJ 813, CA (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212; [1979] 1 LNS 18, PC (refd)

Helen Las ak Renyo v Na' bt Zainudin & 4 Ors KCH-22NCvC-43/6 of 2014 (HC1) (Unreported) (refd)

Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (f) [2002] MLJU 263; [2002] 4 CLJ 486, HC (refd)

Linui ak Kuyang v Mohamad Adam bin Kassim & 4 Ors KCH-22NCvC-38/6 of 2014 (HC2) (Unreported) (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Mahadevan & Anor v Patel [1975] 2 MLJ 207; [1975] 1 LNS 95, FC (refd)

Nabeh ak Luki v Julie ak Kubuk & 4 Ors KCH-22NCvC-42/6 of 2014 (HC3) (Unreported) (refd)

Narawi bin Sajili v Stephen Joebenny ak Tumbek Originating Summons No KCH-24NcvC-2/1 of 2014 (Unreported) (refd)

Ngidos ak Nanbi v Awai bt Zainudin & 4 Ors KCH-22NCvC-399/6 of 2014 (HC3) (Unreported) (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463, CA (refd)

Pohip ak Nasip v Joseph ak Kawai & 4 Ors KCH-22NCvC-35/6 of 2014 (HC2) (Unreported) (refd)

Ramalingam a/l Rasaratnam v Sellam w/o Nadarajan [2004] 6 MLJ 182, HC (refd)
Registrar Of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44; [1976] 1 LNS 135, PC (refd)
Runet ak Nganjar v Ugan ak Rikaw & 4 Ors KCH-22NCvC-40/6 of 2014 (HC1) (Unreported) (refd)
Su Meu Ging v Philip Yong Khiam Poon & Ors And other appeals [1988] 3 MLJ 86, SC (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113; [1984] 2 CLJ 26, FC (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 128, 134, 173, 174, 174(1), 177, Form 19B, Form O

Andy Tan (Andy and Assoc) for the plaintiff.
Chua Kuan Chin (Baru Bian & Co) for the defendant.

Mairin Idang JC:

[1] The land here is small, only containing an area of 4,430 sq meters ('the said land'). The said land is situated at Kampung Sudat, Batu 4 1/2, Jalan Penrissen, Kuching which was alienated to the defendant in perpetuity with effect from the 2 December 2004 and rent free. The said land is to be used for agricultural purposes. The defendant and her daughter have constructed their respective houses on the said land. The original land title of the said land is still with the defendant. On the 19 February 2014 the defendant had lodged a caveat (Caveat No L 3802/2014) on the said land ('the said caveat').

[2] On the 8 May 2014 the plaintiff had filed an application (encl 1) to remove the said caveat.

[3] The parties had filed the following affidavits and submissions:

(a) the plaintiff's affidavit-in-support dated 7 May 2014 (encl 2);
(b) the defendant's affidavit-in-opposition dated 25 June 2014 (encl 6);
(c) the plaintiff's affidavit-in-reply dated 11 July 2014 (encl 7);
(d) the defendant's submission dated 23 July 2014; and
(e) the plaintiff's submission dated 6 August 2014.

[4] The registration of the said caveat was made upon the discovery that the defendant was no longer the registered owner of the said land. This is how the defendant discovered she was no longer the registered owner. The defendant's

affidavit (encl 6) and documents annexed thereto showed that the defendant was on the 2 January 2014 visited by a Chinese man who had come to inspect the said land with the view to purchase the same. The Chinese man had then told the defendant that he was buying the said land from one Mohktar bin Jaya the registered owner of the said land. The defendant with haste proceeded to do a search at the Lands and Surveys Department Kuching Division on the 3 January 2014. True enough Mohktar bin Jaya was the registered proprietor on the 23 August 2013. The defendant was also to discover that the said Mohktar bin Jaya had purchased the said land from Hamidi bin Jamil for RM105,000. The said Hamidi bin Jamil was the registered owner on 30 April 2012 after having purchased the said land from Na' bt Zainudin for the sum of RM95,000. The said Na' bt Zainudin was the registered owner of the said land on the 7 March 2012 having purportedly purchased the said land from the defendant on the 19 January 2012 for a consideration of RM95,000. The defendant had also discovered that her signature on the memorandum of transfer was purportedly witnessed by one Susan Gau an advocate from Messrs Lim Tan & Partners. The defendant had also discovered that she had purportedly applied for the issuance of a new title to the said land which was issued by the Department of Lands and Surveys on the 20 August 2011. The defendant had on 3 January 2014 lodge a police report under Kota Sentosa/000033/14 for the purpose of police investigation. It was on the instruction of the police that the defendant had on the 19 February 2014 registered a caveat under Instrument No L 3802/2014 at the Kuching Land Registry Office. On 24 June 2014 the defendant had under Suit No KCH-22NCvC-43/6 of 2014 (HC 1) filed an action against Na' bt Zainudin, Hamidi bin Jamil, Mohktar bin Jaya, M/s Lim Tan & Partners and the Registrar of Lands & Surveys Kuching Division ('the said suit').

[5] From the plaintiff's affidavits he had on the 9 July 2013 purchased the said land from Hamidi bin Jamil for a sum of RM105,000. The plaintiff says that he had purchased the said land from the said Hamidi bin Jamil in good faith and for valuable consideration as such the defendant has no caveatable interest in the said land. It was also deposed by the plaintiff that the defendant's allegation of fraud was without basis as the same was neither stated in the caveat or affidavit that showed the defendant had committed fraud upon the defendant.

[6] At the hearing on the 15 September 2014 I dismissed the plaintiff's application with costs of RM3,000 to the defendant. I shall now provide my grounds of judgment.

[7] What is the law on caveats? The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests. It is not only a person who has a right to a registrable interest in land

A that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat: *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; [1975] 1 LNS 95. The purpose of a caveat is therefore to preserve the status quo pending the taking of timeous steps by a B caveator to enforce his or her claim to an interest in the land by proceedings in courts: *Registrar Of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1976] 1 LNS 135.

C **[8]** Now the plaintiff as the registered owner of the land have a prima facie right to have the caveat removed unless the defendant can establish that she has an interest in the land which needs to be protected: *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113; [1984] 2 CLJ 26. In an application by a registered owner or caveatee to remove a caveat, the onus is on the caveator D to satisfy the court that on the evidence presented to it the caveator's claim to an interest in the land raises a serious question to be tried and the caveator must then go on to show that on the balance of convenience it would be better to maintain the status quo until the determination of the trial by preventing the registered owner from disposing the land to a third party: *Eng Mee Yong & Ors* E *v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18.

[9] In 1995 the Court of Appeal introduced a three stage inquiry when hearing application for removal of caveat. This was the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, where at F p 741 Gopal Sri Ram JCA (as he then was) propounded the three stage approach. The learned judge of the Court of Appeal opined:

> (i) The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are G insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.
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> (ii) The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a cavetable interest. He must go on to show, in appropriate cases, H that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.
>
> At this the second stage the court is more concerned with matters of evidence and proof offered to support the caveator's claim ... [A]lthough a I caveator may, in his application for the entry of a caveat, show a prima facie cavetable interest in the property in question, he may fail to adduce satisfactory evidence at the hearing of the application for its removal so that the judge would be entitled to hold that the claim in support of the caveat has not been made out and that there is therefore no serious question to be tried.

(iii) The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18 (PC) as 'the balance of convenience'.

[10] Having stated the case laws on the removal of caveat let me now refer to ss 173 and 174 of the Sarawak Land Code (material parts) which deal with the registration of a caveat:

173 Any person—

(a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever ...;

(b) ...

(c) ...

may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

174(1) Every caveat ... shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor.

[11] Now to recapitulate. The plaintiff is now the registered proprietor of the said land. The defendant is challenging this. The defendant had lodged a caveat against the said land on 19 February 2014 with the statutory declaration affirmed on 17 February 2014 ('statutory declaration') (see exh 'HL 4', affidavit-in-opposition of Helen Las ak Renyo). The plaintiff has applied for the caveat's removal under s 177 of the Sarawak Land Code.

[12] What I need to do at the first stage is the examination of the grounds expressed in the application for the caveat. The defendant is obliged to satisfy the court that his claim as expressed in the application in Form O amounts in law to a caveatable interest. Sri Ram JCA (as he then was) in *Luggage Distributors (M) Sdn Bhd*, had stated: This appears to be a question of law because the caveator is obliged to satisfy the court at this stage that 'his claim as expressed in the application in Form 19B amounts in law to a caveatable interest'. And s 174(1) of the Sarawak Land Code says, inter alia, that a caveat 'shall state with sufficient certainty the nature of the estate or interest claimed' and 'how it is derived from the proprietor'. At this stage it prevents the court from looking at grounds other than those stated in the application for the caveat (see also the case of *Law Pik Tai @ Lau Paik Tai v Wong Nyiik Foon @ Wong Nyiik Kiew (f)* [2002] MLJU 263; [2002] 4 CLJ 486). What is sufficient interest? It entails that where the nature of an interest is described in a document then either the claim must be described in the application for the

caveat or the document must be annexed and how the interest is 'derived from the proprietor' means that each transaction or step by which an interest is passed on to or 'derived' by the caveator from the owner must be stated. I have read the Form O and the statutory declaration sworn to by the defendant and it is my view that the defendant had complied with the requirement of the first stage.

[13] Of the second stage of the inquiry this is what Sri Ram JCA had said in *Luggage Distributors (M) Sdn Bhd*: 'He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case. At this second stage the court is more concerned with matters of evidence and proof offered to support the caveator's claim'. 'At this intermediate stage court will look at the caveat document and its 'other supporting documents' if any and the statement of claim, if there is pending action and the supporting and opposing affidavits'.

[14] Now the plaintiff in para 4 of his affidavit-in-reply (encl 7) had stated: 'the defendant's allegation that the transfer of the said land to me was fraudulently done is without any basis. I state there is nothing in the defendant's caveat or affidavit which shows that I had committed fraud upon the defendant'. I have looked at the affidavits filed by both parties. I have also read the said suit filed by the defendant. I think the defendant had raised serious issues. They are these. Did the defendant sell the said land to the said Na' bt Zainudin. Did defendant sign before the said Susan Gau. Did the defendant receive the alleged consideration of RM95,000 from Na' bt Zainudin. How is it that a new land title to the said land had been issued when the defendant is still keeping the original land title that was issued to her in 2004. The defendant had asserted in her affidavit that she had not made any application to replace the original title to the said land and never made a police report to support the issuance of the new title. All of these are well pleaded in the said suit filed by the defendant.

[15] To me the predicament now faced by the defendant was due to the issuance of the new land title to the said land. Her problem or her 'loss' started from there. I am actually perplexed how a new issue document of title was issued out when the original land title is still with the defendant. There is sinister in all these. There is sinister in all these. This brings me to the procedure to be adopted when the registrar considers the application to issue a new issue document title to the said land.

[16] Obviously an applicant for a new issue document title would have to comply with s 128 of the Sarawak Land Code (Cap 81) which provides:

(1) In the event of any issue document of title being lost, mislaid or wholly or

partly destroyed, the registered proprietor, together with other persons, if any, having knowledge of the circumstances, may make a statutory declaration as to the facts giving the names and descriptions of the registered proprietors and particulars of all charges or other dealings affecting the land and the title thereto.

(2) The Registrar, if satisfied as to the truth of the declaration, may issue a new issue document of title which shall be an exact copy of the original document of title, or contain the same particulars, and shall also give particulars of every registered charge or other dealing that affects the land and the title thereto.

(3) The Registrar shall at the same time enter in the Register notice of the issuing of the new issue document of title, and the date thereof, and the circumstances under which it was issued.

(4) The Registrar before issuing the new issue document of title shall give at least one month's notice of his intention so to do, and shall publish the same locally and also in the Gazette.

(5) Every such new issue document of title shall be available for all purposes and uses for which the original issue document of title so lost, mislaid or destroyed would have been available, and shall be as valid to all intents as the lost issue document of title.

(6) This section shall, as far as they are applicable and with the necessary modifications, apply to any sub-lease or charge which the outstanding duplicate has been lost, mislaid or destroyed.

[17] When I was the Registrar of Land Titles in Sabah way back in 1982 I had the occasion to visit the The Lands & Surveys Department of Kuching Sarawak. I was thankful to the director then who had kindly given to me a copy of the 'Manual of Instructions for Land Registry' ('the said manual'). I still have the said manual in my house. Although the said manual has no forced of law I think the said manual would still be referred to by the registrar. At p 63 of the said manual, paras 106–114 explain the procedure for the issuance of new documents of title in case of loss under s 128 of the Sarawak Land Code. Paragraphs 106–114 say:

– the proprietor of the land may make a statutory declaration setting the facts of the case, the Registrar if satisfied as to the truth of the case should give at least one month's notice of his intention to issue the title, such notice to be published in one issue of the Government *Gazette* and also locally, ie, the notices should also be posted in the Land office and district land office of the district within which the land is situated. The period of the notice is to be computed from the date of the publication in the Government *Gazette* (See paragraph 106).

– *The issue documents of title should be delivered to the proprietor of the land in the Delivery of Titles Book* and the issue of title may only be delivered to an agent of the owner when authority in writing from the owner to dos so is produced to the Register (See paragraph 114). (Emphasis added.)

[18] As asserted by the defendant the land title is still with her. She had exhibited this in her affidavit. It is the defendant's contention that the land title presently with the plaintiff was issued fraudulently. The plaintiff has not even addressed this issue in his affidavits. Obviously there are now two land titles to the said land. Which one is the valid one. The one with the defendant or the one with the plaintiff. This is a serious issue which can only be determined in the hearing of the said suit. The Registrar of Lands & Surveys Kuching will have to do a lot of explaining on who had made the application and whether there had been compliance with procedure for issuing of a new issue document of title. Did the registrar deliver the issue document of title to the defendant?

[19] Now what would be the effect on document of title procured or made by fraud. Section 134 has this to say:

> (1) Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against any person defrauded, or who may be defrauded, thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such a person, shall take any benefit therefrom.

[20] The plaintiff is obviously relying on 'the said land was transferred to me by Hamidi bin Jamil in good faith and for valuable consideration'. Can he do so when the land title in his possession had been issued fraudulently?

[21] I am also concern that the plaintiff had not even gone to the said land to inspect the same whether the land has been cultivated or that there were two houses constructed therein. I am also concern that the Chinese man who had gone to inspect the said land with the view to purchase the same would have reported back to the plaintiff that the defendant had claimed to be the registered owner. To me a bona fide purchaser would have checked the status of the said land before purchasing the same.

[22] On the third stage His Lordship Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd*, has this to say: 'Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the balance of convenience'.

[23] Now learned counsel for the defendant had cited the case of *Ramalingam a/l Rasaratnam v Sellam w/o Nadarajan* [2004] 6 MLJ 182 wherein the High Court held that once a caveator can show a caveatable interest and that there are serious issues to be tried the balance of convenience would lie with the retention of private caveat and the balance of convenience would ensure that status quo is maintained. Learned counsel also cited the Court of Appeal case of *Devi Meyyammai a/p M Ramanathan & Anor v Hartini bt Mohamad & Anor* [2013] 3 MLJ 813 which had held that balance of convenience merits that the caveat be allowed to remain to prevent further

dealing in the property pending the determination of the dispute between the parties.

[24] The defendant had already commenced a suit under Suit No KCH-22NCvC-43/6 of 2014 (HC 1) against Na' bt Zainudin, Hamidi bin Jamil, Mohktar bin Jaya, M/s Lim Tan & Partners and the Registrar of Lands & Surveys Kuching Division. In *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 His Lordship Gopal Sri Ram JCA (delivering the judgment of the Court of Appeal) at pp 468–469 said:

> ... it was incumbent upon the respondent to commence proceedings to enforce what it perceived to be its rights under the contract in question. Yet, as earlier observed, no action was ever commenced by the respondent, even up to the date of hearing this appeal. And no explanation whatsoever was forthcoming from the respondent for this failure. In these circumstances, it would be an affront to justice to prevent the appellant from continuing to deal with the subject lands.

[25] In the present case the defendant had commenced the said suit timeously. Is the said suit frivolous? I have read the said suit which is exh 'HL 8'. I have also read para 16 of encl 6. The averments there include fraudulent transfer of the said land; forgery of the defendant's signature and negligence on the part of the Registrar of Lands & Surveys in issuing the new land title. Now there are decided cases that say the defendant does not have to show that her claim will succeed on a balance of probabilities at the trial of her suit. The court in dealing with the caveat proceedings is not concerned with whether the caveator will 'ultimately succeed' in her suit. The court should not 'speculate' about her chances of success. The court should 'as a matter of prudence' avoid expressing opinion on the merits of the claim on the affidavit evidence otherwise it would render the civil suit 'otiose' and cause 'embarrassment' to the judge hearing the action.

[26] Having perused all the affidavits filed by the parties it is my view that the caveator had shown a caveable interest and that there are serious issues to be tried thus the balance of convenience would lie with the retention of private caveat to ensure that status quo is maintained pending the determination of the dispute between the parties. (See *Ramalingam a/l Rasaratnam* and *Devi Meyyammai a/p M Ramanathan & Anor*).

[27] One other matter that has been brought to my attention is the disclosure in the submission of learned counsel for the defendant that there were several pieces of land within the vicinity of Kampung Sudat to have been allegedly transferred to other persons without the owners knowing about it although the land titles are still in their possession. The respective land owners had filed their actions in the court. The cases that have been filed are these: (1) KCH-22NCvC-35/6 of 2014 (HC2) — *Pohip ak Nasip v Joseph ak Kawai & 4*

Ors; (2) KCH-22NCvC-399/6 of 2014 (HC3) — *Ngidos ak Nanbi v Awai bt Zainudin & 4 Ors*; (3) KCH-22NCvC-42/6 of 2014 (HC3) — *Nabeh ak Luki v Julie ak Kubuk & 4 Ors*; (4) KCH-22NCvC-38/6 of 2014 (HC2) — *Linui ak Kuyang v Mohamad Adam bin Kassim & 4 Ors*; (5) KCH-22NCvC-40/6 of 2014 (HC1) — *Runet ak Nganjar v Ugan ak Rikaw & 4 Ors* and (6) KCH-22NCvC-43/6 of 2014 (HC1) — *Helen Las ak Renyo v Na' bt Zainudin & 4 Ors*. The plaintiff in cases No (2), (3), (5) and (6) which is the present case are sued as the third defendant. To me it's a bit of a coincidence that the plaintiff was also sued as the purchaser of these lands which are the subject matter of the four suits. These four suits tell me that there is allegation of fraud in the purchase of the said lands with the involvement of the plaintiff otherwise he would not be sued as a party. Learned counsel for the defendant submitted: '... there are indeed elements of fraud when there are so many cases involving the same modus operandi which had caused lands to be fraudulently transferred away without the knowledge of their registered proprietor in the same area in Kampung Sudat'.

[28] Learned counsel for the defendant has also brought to my attention the case of Originating Summons No KCH-24NcvC-2/1 of 2014, between *Narawi bin Sajili v Stephen Joebenny ak Tumbek* involving a land also within the same locality of Kampung Sudat wherein Her Ladyship Dato Rhodzhariah bt Bujang had dismissed the application for removal of caveat. The learned judge had said: 'What stopped me from granting the relief sought here is that the time sequence of the three transfers of the land before it ended with Narawi in themselves raised eyebrows — the three transfers were just a few months apart ... and for the same amount ... which facts in themselves raised an alarm as to the genuiness of the transactions. Since the transfers were not based on natural love and affection, the transferors surely would have to incur cost on the transfers such as real property gains tax and based on assertion made on affidavit alone, a court cannot presumed Narawi as a bona fide purchaser for value and declare that he was not complicit in the alleged fraud'. The learned judge had cited the Supreme court decision in *Su Meu Ging v Philip Yong Khiam Poon & Ors And other appeals* [1988] 3 MLJ 86 wherein the Supreme Court had held that whether there was collusion or fraud between landowners and developers to the detriment of the interest of the purchasers could only be decided at the trail and not on affidavit evidence. The present case before me is more or less of the same scenario. I am therefore with Her Ladyship that I should dismiss the plaintiff's application to remove the caveat. Both the plaintiff and defendant as justice would require should have their days at the trial of the said suit.

[29] For reasons stated above I therefore dismiss the plaintiff's application with costs of RM3,000 to the defendant.

Plaintiff's application dismissed with costs of RM3,000.

Reported by Kanesh Sundrum